

# **Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act**

**July 21, 2003**

## **INTRODUCTION**

The Clean Water Act (CWA) contains several sections requiring reporting on the quality of the Nation's waters. Section 305(b) requires a comprehensive biennial report and Section 303(d) requires, from time to time, a list of waters for which effluent limitations are not sufficient to meet water quality standards (WQS). In its regulations implementing Section 303(d), EPA has defined "time to time" to mean on April 1 of every even-numbered year. EPA is recommending that for the 2004 submission, States and Interstate Commissions (that prepare 305(b) reports) provide a single water quality monitoring and assessment report (the Integrated Report) that combines the comprehensive Section 305(b) report on water quality and the Section 303(d) list of waters for which TMDLs are required, while also satisfying the requirements of Section 314.

Placement of all of a State's waters into one of the five categories is the most significant feature of the Integrated Report. The categories represent varying levels of WQS attainment, ranging from Category 1, where all of a water's designated uses are met, to Category 5, where a pollutant impairs a water and a TMDL is required. These category determinations should be based on consideration of all existing and readily available data and information consistent with the State's assessment methodology and this guidance. For the remainder of this document, the term "methodology" refers to a State's assessment methodology. Each water segment should be placed in one of the assessment categories and monitoring scheduled by year for all categories.

States must submit their 2004 Integrated Report to EPA by April 1, 2004.

## **HOW SHOULD WATERS BE SEGMENTED IN THE INTEGRATED REPORT?**

The Integrated Report provides for a comprehensive description of the status of all waters within a State. Fundamental to this accounting is segmentation and geo-referencing of all water resources including rivers, streams, lakes, wetlands, estuaries, and coastal waters.

## **WHAT ARE THE COMPONENTS OF AN INTEGRATED REPORT?**

This guidance stresses the use of the five assessment categories introduced in the 2002 guidance. In broad terms, the five assessment categories are as follows:

Category 1: All designated uses are met;

Category 2: Some of the designated uses are met but there is insufficient data to determine if remaining designated uses are met;

Category 3: Insufficient data to determine whether any designated uses are met;

Category 4: Water is impaired or threatened but a TMDL is not needed (see Section II E of this document);

Category 5: Water is impaired or threatened and a TMDL is needed.

All waters should be placed in one of the five assessment categories and the categories are designed so that no water is placed in more than one category. It is important to note that the State does not need to physically collect monitoring data in each water in order to assign it to an assessment category.

To properly use the five assessment categories and to satisfy Sections 303(d)(1)(A) and (B), 305(b) and 314 of the CWA, the Integrated Report should include the following components:

- \* A categorization of all waters in the State based on readily available data and information.
- \* A description of the methodology used to place waters in Categories 1 through 5.
- \* WQSs attainment status.
- \* A schedule for establishment of TMDLs.
- \* Monitoring schedules for waters and a statement identifying any significant changes to the State's water quality monitoring and assessment program (i.e., change in segmentation, adoption of a rotating basin approach, etc.) since the previous listing cycle.
- \* A description of the public participation process, summary of the comments received, the responses to the comments, and documentation that the State conferred with neighboring States concerning assessment determinations of interjurisdictional (shared) waters.
- \* Information to fulfill the requirements of CWA Section 305(b)(1)(C) through (E).

#### **Which waters belong in Category 1?**

Waters belong in Category 1 if they are attaining all designated uses and no use is threatened. Segments should be listed in this category if there are data and information that are consistent with the State's methodology and this guidance, and support a determination that all WQSs are attained and no designated use is threatened.

#### **Which waters belong in Category 2?**

Waters should be placed in Category 2 if there are data and information that meet the requirements of the State's assessment and listing methodology that support a determination that some, but not all, designated uses are attained and none are threatened. Attainment status of the remaining designated uses is unknown because data are insufficient to categorize a water consistent with the State's listing methodology.

#### **Which waters belong in Category 3?**

Waters belong in Category 3 if there are insufficient or no data and information to determine, consistent with the State's listing methodology, if any designated use is attained. To assess the attainment status of these waters, States should schedule monitoring on a priority basis to obtain data and should also make efforts obtain information necessary to move these waters into Categories 1, 2, 4, and 5.

When States choose to support their assessments with the collection of supplemental data, Category 3 provides States with the flexibility to monitor these waters in a manner consistent with their overall monitoring strategy and schedule.

Category 3 responds to one of the recommendations in the 2001 National Research Council's (NRC) report, *Assessing the TMDL Approach to Water Quality Management* (2001) that EPA and States identify waters where information is not sufficient to determine a water's status, and thus identify waters where additional data and information is necessary prior to making an assessment determination.

### **Which waters belong in Category 4?**

Waters belong in Category 4 if one or more designated uses are impaired or threatened but establishment of a TMDL is not required. States may place an impaired or threatened water that does not require a TMDL in one of the following three subcategories: a TMDL has been completed for the water-pollutant combination (Category 4A), other required control measures are expected to result in the attainment of WQSs in a reasonable period of time (Category 4B); and the impairment or threat is not caused by a pollutant (Category 4C).

#### *1. Which waters belong in Category 4A?*

Waters should only be placed in Category 4A when all TMDLs needed to result in attainment of all applicable WQSs have been approved or established by EPA. Once the TMDLs have been approved or established, the State should implement the TMDL as soon as practicable. Additionally, EPA encourages States to provide monitoring schedules for these waters to ensure that sufficient data are obtained to document progress of the implementation actions toward the attainment of WQSs, and that progress is reasonably consistent with the projected time of attainment included in the TMDL.

#### *2. Which waters belong in Category 4B?*

Current regulations do not require TMDLs for all waters. Some waters may be excluded from Category 5, and placed into Category 4B. In order to meet the requirements to place these waters into Category 4B, the State must demonstrate that “other pollution control requirements (e.g., best management practices) required by local, State or Federal authority” (see 40 CFR 130.7(b)(1)(iii)) are expected to address all water-pollutant combinations and attain all WQSs in a reasonable period of time. EPA expects that States will provide adequate documentation that the required control mechanisms will address all major pollutant sources and establish a clear link between the control mechanisms and WQSs.

#### *What are EPA’s expectations for including waters impaired by nonpoint sources in Category 4B?*

Placement of waters in Category 4B based on §130.7 (b)(iii) must be supported by the existence of “other pollution control requirements (e.g., best management practices) required by local, State, or federal authority” that are stringent enough to implement WQSs. EPA expects that the State will demonstrate that these control requirements will achieve WQSs within a reasonable period of time. States should provide the following information to support including a water in Category 4B:

- \*identification of the controls to be relied upon (for example, best management practices, air emission controls, sediment dredging, etc.);
- \* authority (local, state, federal) under which the controls are required and will be implemented with respect to the sources contributing to the water quality impairment (for example, self-executing State or local regulations, permits, or contracts that require implementation of the necessary controls);
- \*document how the control measures are generally applicable to the impairment in question and can reasonably be expected to reduce pollutant loadings and ultimately attain WQSs when fully implemented. Generally, sufficient documentation will;

- \*describe the rationale for why these control mechanisms will achieve WQSs within a reasonable period of time,
- \* list the suite of controls proposed for implementation and a range of the controls' effectiveness (e.g., cover crops will reduce current sediment loadings by 50-60%),
- \* estimate the number of acres that will be treated by the general class of controls to achieve the target load (e.g., approximately 60 acres will receive cover crops, approximately 30 acres will be subject to no-till practice, and 25 acres will be planted with riparian buffers),
- \* document that the water quality should be achieved as soon as practicable once full implementation occurs, or for controls required as part of an iterative or adaptive management program, provide reasonable assurance that phased implementation will continue until WQSs are achieved, and
- \* document the basis by which implementation of these measures is required (e.g., permits, self executing regulations, contracts, and agreements),
- \* provide information about the certainty of funding availability. For blended waters (waters with both point and nonpoint source pollutant loads), EPA would expect that States would provide adequate documentation that both sets of proposed controls will achieve WQS in a reasonable time frame.

Watershed plans may be used to support including a water in Category 4B if the information listed above is included in the plan for that water.

EPA also believes that management measures implemented by Federal agencies designated as management agencies, that meet one of the above criteria, might also obviate the need for establishing TMDLs.

#### *Which waters belong in Category 4C?*

Waters should be listed in this subcategory when an impairment is not caused by a pollutant. States should schedule these segments for monitoring to confirm that there continues to be no pollutant-caused impairment and to support water quality management actions necessary to address the cause(s) of the impairment.

Pollution, as defined by the CWA, is "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water" (Section 502(19)). In some cases, the pollution is caused by the presence of a pollutant and a TMDL is required. In other cases, pollution does not result from a pollutant and a TMDL is not required. Elevated temperature that results from man-made thermal discharges does require a temperature TMDL based on the protection or propagation of a balanced indigenous population of shellfish, fish, and wildlife.

The following are two examples of pollution caused by pollutants. The discharge of copper from an NPDES regulated facility is the introduction of a pollutant into a water. To the extent that this pollutant alters the chemical or biological integrity of the water, it is also an example of pollution. (Copper is not likely to cause an alteration to the water's physical integrity). Similarly, actions that modify the landscape and may result in the introduction of sediment into a water constitute pollution when sediment (which is a pollutant) results in an alteration of the chemical, physical, biological or radiological integrity of the water. TMDLs would have to be established for each of these waters.

EPA does not believe that flow, or lack of flow, is a pollutant as defined by CWA Section 502(6). Low flow can be a man-induced condition of a water (i.e., a reduced volume of water) which fits the definition of pollution. Lack of flow sometimes leads to the increase of the concentration of a pollutant (e.g., sediment) in a water. In the situation where a pollutant is present a TMDL, which may consider variations in flow, is required for that pollutant.

### **Which waters belong in Category 5?**

This category constitutes the Section 303(d) list that EPA will approve or disapprove under the CWA. Waters should be placed in Category 5 when it is determined, in accordance with the State's assessment and listing methodology, that a pollutant has caused, is suspected of causing, or is projected to cause an impairment or threat. If that impairment or threat is due to a pollutant, the water should be placed in Category 5 and the pollutant causing the impairment identified.

A water is considered impaired when one or more designated uses are not attained. Where more than one pollutant is causing the impairment, the water should remain in Category 5 until all pollutants are addressed in a completed/EPA-approved TMDL or by one of the delisting factors mentioned in the answer to question 2.a. below in this section.

*1. Is Category 5 of the Integrated Report for 2004 a **new** Section 303(d) list, and must the State account for all waters previously listed as needing a TMDL in the 2002 list?*

The Section 303(d) list once approved (or, if necessary, established by EPA following disapproval of a State's list) is a new list that replaces the previous list. The time frame for establishing TMDLs for individual water/ pollutant combination should be 8 to 13 years from the date of the original water/pollutant combination listing. For example, a water/pollutant combination originally included on the 1998 Section 303(d) list, and still identified on the 2004 submission as requiring a TMDL, should be addressed by 2011.

The fact that a water was previously included in Category 5 is not, by itself, positive evidence that it must remain in Category 5 until a TMDL is established. Waters should generally remain in Category 5 until a TMDL is established unless there is reason to believe that conditions that led to the initial listing have changed (WQSS are attained, actions justifying inclusion in Category 4, etc.), or that the basis for the initial listing was in error. In any of these circumstances where a water's status might change, all existing and readily available data and information should be considered, and the most current methodology applied to determine the water's most appropriate placement into one of the five categories.

EPA may request, as discussed below, that the State demonstrate "good cause" for not including previously listed segments in Category 5 (40 CFR 130.7(b)(6)(iv)). EPA may request this demonstration if the State does not develop a credible methodology (consistent with the State's WQSS, relevant sections of CALM, and this guidance), or does not apply the methodology consistently, especially where the "delisting" of an impaired water on a previous list is not supported by the application of the State's methodology.

### *What Additional Information is needed for waters in Category 5?*

#### *a. Identification of Pollutants*

Section 130.7(b)(4) requires States to identify, for each Section 303(d) list (Category 5 waters) submitted to EPA, the "pollutants causing or expected to cause violations of the applicable water quality standards." For the 2004 listing cycle, waters identified as impaired or threatened relative to biological criteria should be included in Category 5 unless it is known that a pollutant is not causing the impairment. States should identify all pollutants that are known to be causing the impairment of a water.

#### *b. Prioritization and TMDL Schedule*

Section 303(d) requires States to "establish a priority ranking" for the waters it identifies on the list, taking into account the severity of the pollution and the uses to be made of such waters, and to establish TMDLs "in accordance with the priority ranking." Federal regulations provide that "schedules for submissions of TMDLs shall be determined by the Regional Administrator and the State" (40 CFR 130.7(d)(1)). Other reasonable factors such as the State's use of a rotating basin approach or commitments specified in court orders or consent decrees may also be considered when States develop priorities and schedules. To implement this provision, EPA recommends that States develop a schedule for establishing TMDLs as expeditiously as practicable and that (1) identifies which TMDLs will be established in each year of the upcoming Integrated Reporting cycle and (2) the approximate number of TMDLs to be established for each year thereafter. EPA encourages the States to ensure that the schedule provides that all TMDLs for waters listed on previous Section 303(d) lists be established within 8 to 13 years. In addition, EPA suggests that newly identified Category 5 waters have a TMDL developed no later than 13 years after the water is first identified in Category 5. EPA will not be taking any action on either of these schedules. The schedules are intended to help the public and EPA to understand the State's priorities and assist in work planning.

In developing their schedules, States will need to decide which TMDLs are higher priority than others. States need not specifically identify each TMDL as high, medium or low priority. Instead, the schedule itself can reflect the State's priority ranking. The CWA does not prescribe a particular method of expressing a priority ranking, and EPA believes a TMDL schedule is a reasonable, efficient way to demonstrate priority ranking. In some circumstances, the order in which TMDLs are established might be subject to some modifications such as logistical efficiencies or data availability.

The State should demonstrate that it conferred with neighboring States concerning assessments of waters that cross or share State boundaries. Where neighboring States do not agree on listing decisions for these waters, the States should confer with the EPA Region(s) in advance to seek assistance in reconciling listing judgments.